it would seem from the analogy to solid minerals that partition should not be decreed. Especially is this true when the petitioners do not own the surface. A partition, under such circumstances, of the gas or oil, separate from the surface, by alloting it by sections of the surface, would be void. *Hall* v. *Vernon,* 47 W. Va. 295. However, so long as the presence of oil or gas on the premises has not been determined, it is hard to see why the land should not be divisible in kind. "There is no doubt," says an authority, "that an action of partition lies to divide undeveloped and supposable oil or gas lands, just as it does in the case of lands containing solid materials; for it cannot be known, owing to the peculiar character or oil or gas as a mineral, whether the land to be divided is actual gas or oil land; and to refuse partition on the theory that it may be, would be for the court to enter upon the domain of mere speculation or supposability." THORNTON, OIL AND GAS, § 277. Following this line of reasoning, it would seem that the principal case is wrong.

SALES—ACCEPTANCE WITH KNOWLEDGE OF BREACH OF EXPRESS WARRANTY AS WAIVER OF BREACH.—Defendant contracted to buy brick from the plaintiff at $17.25 per M, the brick to be shipped in installments; there was an express warranty that the brick be of a certain kind and grade. Plaintiff shipped an inferior brick which ordinarily sold at $13.75 per M. Defendant accepted and used them without notifying plaintiff or offering to return them. Plaintiff sued for the purchase price at $17.25 per M and defendant sought to set-off the difference in price between the brick contracted for and those delivered. The set-off was allowed, the court holding the express warranty was not waived for purposes of set-off at least, by defendant's accepting and using the brick without notifying the plaintiff of the inferior quality before the action. *Peterson* v. *Denny-Renton Clay & Coal Co.,* (Wash. 1916) 154 Pac. 123.

Ordinarily a general express warranty will not be construed to cover obvious defects. WILLISTON, SALES, 271-2. But the modern authorities with few exceptions hold that a special express warranty survives acceptance even as to defects known to the vendee at the time of acceptance, for purposes of set-off and counterclaim, although not for purposes of recission. *Harris* v. *Marsh,* 217 Fed. 555, 133 C. C. A. 407; *Weed* v. *Dyer,* 35 Ark. 155, 13 S. W. 592; *Underwood* v. *Wolf,* 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *North Alaska Salmon Co.* v. *Hobbs, Wall & Co.,* 159 Cal. 380, 113 Pac. 870, 35 L. R. A. (N. S.) 501; *Davidson Bros.* v. *Smith,* 143 Ia. 124, 121 N. W. 503; *Graff* v. *D. M. Osborne Co.,* 56 Kans. 162, 42 Pac. 704; *McCormick Harvesting Machine Co.* v. *Fields,* 90 Minn. 167, 95 N. W. 886; *Eversole* v. *Hanna,* 184 Mo. App. 445, 171 S. W. 25; *Eichbaum* v. *Caldwell Bros. Co.,* 58 Wash. 163, 108 Pac. 434; 5 MICH. L. REV. 298. The principal case would probably have been decided the same way that it was by any of the courts adhering to this general rule, even though defendant knew of the defects before acceptance. The Georgia courts, however, hold that such a warranty is waived for all purposes where the vendee accepts with knowledge of the defects. *Springer* v. *Indianapolis Brewing Co.,* 126 Ga. 321, 55 S. E. 53;

Henderson Elevator Co. v. *North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50, 5 MICH. L. REV. 298; *Christian* v. *Knight & Co.*, 128 Ga. 501, 57 S. E. 763; *Langston & Co.* v. *Neely & Co.*, 8 Ga. App. 64, 68 S. E. 559. But the courts uniformly hold that in the absence of a provision in the contract for an inspection, where the goods are shipped from a distance, a failure to inspect will not waive an express warranty against patent defects. *Springer* v. *Indianapolis Brewing Co.*, supra; *Carolina Portland Cement Co.* v. *Turpin*, 126 Ga. 667, 55 S. E. 125; *Christian* v. *Knight & Co.*, supra; *Northwestern Cordage Co.* v. *Rice*, 5 N. D. 532, 67 Am. St. Rep. 563, 67 N. W. 298. Therefore the principal case would probably have been decided the same way in Georgia if the defendant did not learn of the defects until after acceptance. The Wisconsin rule seems to be that the vendee must, when he receives the goods and discovers the defects, or a reasonable time thereafter, notify the seller that the goods are defective or else the warranty is waived. *Waupaco Elect. & Ry. Co.* v. *Milwaukee Light & Ry. Co.*, 112 Wis. 469, 88 N. W. 308; *Northern Supply Co.* v. *Wangard*, 117 Wis. 624, 98 Am. St. Rep. 963, 94 N. W. 785. And since the defendant failed to do this, the Wisconsin courts would have denied his set-off.

SPECIFIC PERFORMANCE—PRAYER IN ALTERNATIVE FOR DAMAGES UNDER THE CODE.—Plaintiff sued to recover damages for the breach by defendant of a contract to exchange real properties. Until this suit was filed by the plaintiff the contract was invalid as to him. Defendant set up a cross-petition, alleging that plaintiff breached the contract and asked for specific performance, with a prayer in the alternative for damages. Defendant, when he filed his cross-petition, knew that plaintiff had put it beyond his power to perform. After holding that the contract had been ratified by this suit, the court rendered judgment in damages for defendant as prayed in the cross-petition. *Stramel* v. *Howes*, (Kan. 1916) 154 Pac. 232.

Under the blending of law and equity by means of the Code one may pray for specific performance or in the alternative for damages. *Mitchell* v. *Sheppard*, 1 Tex. 484. Yet under the Code specific performance is still an equitable remedy and it is granted within the discretion of the court. *Snow* v. *Monk*, 80 N. Y. Supp. 719, 81 N. Y. App. Div. 206. Some equity rules which formerly obtained have been changed by the Code. The rule that, where the plaintiff knew at the commencement of an action for specific performance that the defendant could not perform, the suit will not be retained for the purpose of awarding damages, has been abrogated. *Sternberger* v. *McGovern*, 56 N. Y. 12; *Haffey* v. *Lynch*, 143 N. Y. 241, 38 N. E. 298. But see *Park* v. *Minneapolis, etc. Ry. Co.*, 114 Wis. 347, 89 N. W. 532; *Wigglesworth* v. *Wigglesworth*, 45 Wis. 255. Judgment, however, should not be in the alternative. *Levy* v. *Knepper*, 117 N. Y. App. Div. 163, 102 N. Y. Supp. 313. In the case under discussion it was insisted by plaintiff that, since the granting of specific performance still depends upon the court's discretion the alternative prayer for damages should also depend upon discretion. Such principle was not applied because the relief granted was at law, which had been united with the equitable petition in accordance with the Code.